Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Preemption of Local Zoning Regulation of Satellite Earth Stations	)	IB Docket No. 95-59
	)	
In the Matter of	)	
	)	
Implementation of Section 207 of the Telecommunications Act of 1996	)	CS Docket No. 96-83
	)	FCC 96-328
Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service	)	

INTRODUCTION/INDIVIDUAL RIGHTS

The Woodbridge Village Association ("WVA"), Irvine, California, hereby submits the following comments on the Further Notice of Proposed Rulemaking released August 6, 1996, including those from a California perspective.

The basic assumption of Section 207 of the Telecommunications Act of 1966, we believe, is that the "viewer", referred to in that Section, already owns the sole right to decide if the devices referred to therein should be placed on his or her property, except for the described "restrictions". We do not believe the assumption was the viewer was acquiring new property control rights under Section 207 which he or she did not already own.

Clearly, if a co-tenant of a single family detached home, such as a husband and wife, as joint tenants, could not agree as to whether or not one of them could install a named antenna device, the FCC would not take the position that it could require one co-tenant to allow such an installation by the other co-tenant if both did not want it. Clearly such a dispute would be handled

elsewhere, such as in Family Court. So, does the ownership of an undivided interest in common property create greater rights than that situation? We submit it clearly does not with the following support in case law.

Under California case law, through contractual obligations and covenant restrictions, the use and maintenance of these individual interests in common are subject to joint control acting typically through a Board of Directors of a Common Interest Development Association.

In Posey v. Leavitt, 229 Cal.App.3d 1236 (1991), the Court observed that an encroachment into the common area impaired the easements of the other owners over the common area and thus actually required the consent of all of the condominium owners. Even the consent of the Association's Board of Directors was insufficient in that case.

While we realize that these antenna situations involve judgments as to materiality of the encroachment and the effect on other owners, we cannot believe that giving each individual co-owner the unregulated and unbridled right to install antenna type devices anywhere each would choose is reasonable, nor would such a result be allowed under the laws of co-tenancy. Simply put, the right of each of these co-tenants must be subject to review and approval or disapproval by the agreed to contractual method, that is the Association, usually acting through the Board of Directors or an Architectural Review Committee.

This principle was even more clearly expressed in the recent landmark California Supreme Court decision of Nahrstedt v. Lakeside Village Condominium Association, Inc. (1994) 8 Cal.4th361, 878 P.2d 1275; 33 Cal.Rptr 2d63.

In that case, the Court observed at Pg. 372 as follows:

> Use restrictions are an inherent part of any common interest development and are crucial to the stable, planned environment of any shared ownership arrangement.

Further, the Court at 373 states:

> The viability of shared ownership of improved real property rests on the existence of extensive reciprocal servitudes, together with the ability of each co-owner to prevent the property's partition. . . . The restrictions on the use of property in any common interest development may limit activities conducted in the common areas as well as in the confines of the home itself . . . Commonly, use restrictions preclude alteration of building exteriors, limit the number of persons that can occupy each unit, and place limitations on..or prohibit altogether..the keeping of pets.

The Court also cites with approval the Florida Court in Hidden Harbour Estates v. Norman (1970) 309 So.2d 180 which stated:

> "[I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he (or she) might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization."

Also, we recognize that restrictions sometimes clearly conflict with sound public policy and should not be enforced. The Nahrstedt Court agreed and also pointed to Shelley v. Kraemer (1948) 334 U.S. 1 at 381, it said:

> "This rule does not apply, however, when the restriction does not comport with public policy. (Ibid.) Equity will not enforce any restrictive covenant that violates public policy. (See Shelley v. Kraemer (1948) 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (racial restriction unenforceable).

That is precisely the point we wish to make. No such public policy was enunciated in Section 207 to eliminate all property rights to give a "viewer" rights with respect to property he or she does not own individually. Clearly, if Congress had intended to override such property rights, it would have clearly expressed it. It did not and as other commentators have noted and briefed, any usurping of such property rights must be narrowly construed. Even if Congress had, which it did not, such may be unconstitutional

This co-ownership of common area includes much more than just an equitable servitude or covenant running with the land. It is not just a "restriction" mentioned in Section 207. It is a form of ownership which Congress cannot disturb or void without such being a "taking" of private property.

TAKING ISSUES

We do not need to repeat the details contained in other commentator's briefs, especially the points made by Community Association Institute on the taking issue which is prohibited by the Fifth Amendment.

Clearly, we believe Loretto v. Teleprompter Manhattan CRTV Corp. (1982) 458 U.S. 419 expresses the law and prohibits the FCC from issuing a regulation which would, in effect, take other persons property in order to move forward its public policy of promoting a "viewers" ability to receive video programming!

COMMON ANTENNA REQUIREMENTS

WVA also believes the individual project accommodations of the viewer's ability to receive the video programming by antennas and other devices on common property is best left to each project. In some circumstances, the use of a common antenna is feasible. In many instances, it is not.

An "antenna farm" might be a solution to antenna access for a large, single building, or compact multi-building condominiums, but it is impracticable for many Condominiums, especially in California, and we expect elsewhere.

For example, the Woodbridge Village Association is a master association in Irvine, California, covering over 20% of the City of Irvine, California (9500 households) and is composed of 32 subassociations containing all together - 62% of the living units; single family detached houses containing - 19% of the units; and ten apartment complexes containing - 19% of

the units. All of the units have cable access built in, as does the rest of Irvine, and most of Southern California.

The apartment rental units are not included in FCC regulations so far. The single family detached units are covered. Most of the 32 subassociations are condominiums, although several are Planned Unit Developments (PUD's) where the residence and lot are owned in fee by the unit owners, although they belong to a subassociation due to lot size, and open space common area. Some of these membership PUDs cede roof maintenance and replacement to their subassociation, some do not. In that respect, therefore, they are like condominiums in that each has given up some property rights in exchange for common cost sharing.

Most of the condominium associations in Woodbridge are physically divided into several phases - from two to five. These phases are NOT contiguous. They are separated by other tracts and developments. The streets within each phase are generally private in ownership, but open to public access. Only two of the 32 have access gates.

The WVA owns over 180 parcels (lots). About 40 of these lots are WVA recreational facilities, parks with pools, parks with amenities other than pools, two large beach clubs, two 10 court tennis clubs, a headquarters building, and two lakes (25 and 30 acres each). The rest of the lots are scattered all over the village and are primarily landscaping areas between development fences and sidewalks. Each subassociation is a California non-profit corporation with its own Board of Directors. The sole linkage to the WVA, other than the requirement that all owners of residential lots must be WVA members (to share in the expense of the facilities) is to grant to the WVA aesthetic architectural control. The subassociation retains property rights control. For instance, the subassociation determines whether screen doors are allowed in their subassociation, but the WVA determines the color and style of the screen doors. Similar division is maintained for larger issues such as building additions, roofing materials, etc. The subassociation always has the right to contribute to the WVA Architectural Committee deliberation in the same manner as the home owner and his neighbors, but the aesthetic determination is made by the WVA Architectural Committee, or the WVA Board of Directors in the case of an appeal.

Thus there are WVA owned parcels all over the village, some substantial in size - and usually bounded by several subassociations, and many more as open space outside, but adjacent to the confines of either a subassociation or tract of single family homes or apartments.

For WVA subassociations, the necessity of having multiple antenna farms to include in their physically separated locations, the expense of erection and trenching, the necessity of accommodating VHS, UHS, MMDS, DSS (of various providers) and possibly cable (for associations in other areas of the country) make the feasibility and cost prohibitive. Also it would require a 67% vote of the subassociation membership to authorize and fund such an undertaking - an almost certain impossibility.

RESOLUTION

We believe, therefore, that the FCC Rules be restricted to those viewers who have the exclusive use or control of their areas and who maintain their own property and leave the regulation of other co-owned and co-controlled or co-maintained areas to those co-owners to decide how best to accommodate their members' wishes.

Respectfully submitted,

Woodbridge Village Association

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